IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 225.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, A CORPORATION, Petitioner,

vs.

WEST COAST NAVAL STORES COMPANY, A CORPORATION, Respondent.

On Writ of CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit.

Brief of JOHN C. AVERY, Attorney for Respondent.

It is respectfully submitted that petitioner has not presented the real question involved in this case, which was decided by the Circuit Court of Appeals.

As stated in the opinion of that Court, in West Coast Naval Stores Company vs. Louisville & Nashville Railroad Company, 121 Fed. Rep., p. 648, "The question is whether this wharf is a public wharf, or if not public, but a private wharf, is it so located and used that the public has a right to have goods intended for shipment by water beyond Pensacola carried to said wharf and have ships moored at said wharf and there take on its goods?"

This question arose upon the case stated by the Court, thus:

"The case shows that the Louisville & Nashville Railroad Company is in the possession of a large wharf built at its own expense *on the extension of a public street in the City of Pensacola, into the deep waters of the harbor of the City*, on

which street and wharf it has laid railroad tracks connecting with its main line and depot in the City, from which tracks the railroad company carries and transports goods ordered and intended for shipment by water, making a *quasi* terminal of the said wharf."

(NOTE: It will be observed in connection with the above statement by the Circuit Court of Appeals, that the record then before that Court contained a replication (121 Fed., 647), as follows: "That the said wharf is an extension of a street of the City of Pensacola into the Bay of Pensacola, to a distance of more than five hundred (500) yards, all within the limits of the City of Pensacola and maintained by the defendant by authority and permission of the said City;" to which replication a demurrer was filed and sustained by the United States Circuit Court for the Northern District of Florida. For that reason the Circuit Court of Appeals, in its opinion (121 Fed., 648), included in its statement of the case the fact that the wharf in question was built "on the extension of a public street in the City of Pensacola." After the decision of the Circuit Court of the Northern District of Florida had been reversed by the Circuit Court of Appeals, the railroad company withdrew all of its pleas, thereby, of course, eliminating from the record replications thereto and demurrers to the replications, and filed a further and final plea, which appears at page 10, transcript of record. The plaintiff, West Coast Naval Stores Company, demurred to the plea, and, inasmuch as neither the plea nor the declaration alleged that the wharf in question was an extension of a public street, the decision of the Circuit Court upon the plaintiff's demurrer did not involve that element. When the case again reached the Circuit Court of Appeals (Louisville & Nashville Railroad Company vs. West Coast Naval Stores Company, 128 Fed. Rep., 1020), it was, without argument, disposed of by that Court as settled by the former decision of the Court, notwithstanding there did not at the last hearing appear in the record any allegation that the wharf was an extension of a street, and such view was acquiesced in by the parties. The case comes here, then, on *certiorari* without such allegation.)

Plaintiff's case is more clearly and sharply presented by the second count of the declaration (Tr Rec., pp. 6 and 7), which count the Circuit Court of Appeals considered also,

and we shall, therefore, argue the case in reference to that count That being good, it is immaterial whether the first is good or bad, as the plea applies to both, and, if bad, as a defense to the second count, the demurrer to it was properly sustained. We quote as follows from the second count:

"The course of business dealing between plaintiff and defendant then and there was for plaintiff to transfer over said switch and defendant's railway, into the City of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin, to and upon defendant's wharf, extending into the Bay of Pensacola, which wharf was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf; and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels to be in and by such vessels carried to other ports in the transaction of plaintiff's business, of which defendant had notice, and which was the duty of the defendant, as common carriers, as aforesaid, and in the conduct of the wharf, as aforesaid, which was and is a *public wharf*, for a reasonable compensation, which plaintiff was always ready and willing to pay to defendant, to give plaintiff the facilities aforesaid * * * * and that in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucrative business, the defendant notified plaintiff that it would refuse to permit plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew * * * * to be *at, from or by means of defendant's said wharf* loaded upon or delivered to certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports * * * * or to permit the said wharf and said railway of defendant to be used in the prosecution of the plaintiff's business aforesaid, *in so far as the prosecution thereof should involve the use of said vessels* in shipment of plaintiff's said turpentine and rosin from Pensacola."

From this it will be seen that the gravamen of plaintiff's complaint was, not that the defendant would not transport plaintiff's goods on defendant's lines, or any part of them, but only that defendant would not permit plaintiff's goods

to be at, from or by means of, defendant's wharf, loaded upon or delivered to the said vessels.

The only plea not withdrawn before the case was disposed of in the Circuit Court and thereafter in the Circuit Court of Appeals, was, "a plea to the first and second counts of the declaration," (Tr. Rec., pp. 10 and 11) which does not deny that the wharf in question was as stated in the second count of the declaration, that is, "a public wharf," excepting argumentatively by setting forth certain facts in the said plea. That plea states how the defendant built and used the wharf, admitting, among other things, that *a very large part of the public had the use of the wharf* at pleasure, to-wit, those engaged in traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company, an agency of the defendant, and traffic in connection with other vessels subject to special arrangement." The plea expressly denies (Tr. Rec., p. 11) that the defendant "either notified plaintiff that it would not carry plaintiff's naval stores nor refuse to transport plaintiff's naval stores, over defendant's railway, mentioned in the declaration, to and on its wharf, also mentioned in the declaration," but admits "that the *defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf* to be transported by them to the port of New York, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been in competitition with the lines of vessels connecting with the defendant * * * and was in competition with the defendant itself." The further allegation in the plea that the defendant was "ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf as it gave to any and all other shippers," adds nothing to the defense as it is to be taken in connection with the preceding statement of the manner of discrimination made by the defendant and complained of by the plaintiff.

All that is asserted in the plea is, of course, admitted by the demurrer, and there is, therefore, left for adjudication the simple question whether, in view of what the declara-

tion alleges, which is not denied by the plea, and what the plea alleges, and is confessed by the demurrer, there is presented a case for relief.

Whether such case is or is not presented depends upon, and solely upon, whether the wharf in question "is a public wharf, or if not public but a private wharf, is so located and used that the public has a right to have goods intended for shipment *by water* beyond Pensacola carried to said wharf and *have ships moored at said wharf*, and there take on its goods."

That is the sole question which the Circuit Court of Appeals regarded as before it and undertook to decide. In the conclusion of its opinion that Court said, referring to authorities there cited and arguments there made in behalf of the railroad company, "None of these propositions are in our opinion applicable to the present case."

We think this court will find that the Circuit Court of Appeals correctly decided the question before it, and that no other or different question could have properly been adjudicated upon the record there made.

We do not feel that we can add anything to the strength of the opinion of the Circuit Court of Appeals (121 Fed., 648), but venture to submit the following:

1

It was contended by defendant below that the last clause of Section 3, p. 530, U. S. Revised Statutes, or Interstate Commerce Act, secured to the defendant the right to control the wharf in question as a private wharf. It was there said that the pivotal question raised by the demurrer was whether the defendant could refuse to permit a steamboat carrying on a business competitive with the defendant to use its terminal facilities, and that, no matter what might be the common law upon this point, the matter is controlled by the Interstate Commerce Act. The clause of that act referred to is this: "But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

But, what is involved here is terminal facilities, not within the Interstate Commerce Act, but merely a public

wharf. In the State of Iowa vs. Chi., Wilwaukee & St. Paul Rwy. Co., 33 Fed., 391, the Court said:

"It is also urged that the action of the commissioners, sought to be enforced in this proceeding, is in contravention of the last clause of Section 3 of the Act of Congress, approved Feb. 4, 1887, and known as the Interstate Commerce Act. In that section of the act it is provided that any common carrier, subject to the provisions of the act, must afford equal facilities for the interchange of traffic between their respective lines, receiving and delivering all passengers and property to and from their several lines and those connected therewith. And then comes the clause relied on, as follows: 'But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.' The meaning of this clause is clear. It simply declares that the preceding provision of the section shall not be deemed to give the right to one carrier to use the tracks or terminal facilities of another carrier in a like business. It has reference to the effect of the Act of Congress, and nothing else. If the defendant company, by contract with the City of Dubuque, has bound itself to allow other companies to use part of its track or terminal facilities, this clause of the Act of Congress does affect such a contract or an enforcement thereof. So, also, if the State of Iowa has provided by a particular statute that different companies may have a joint or common use of certain terminal facilities, rights of the several companies to such joint use are not affected by the provisions of the Interstate Commerce Act, but the same must be measured and determined by the statutes of the State."

And, in the case of Swift vs. P. & R. R. Co., 58 Fed., 860, Judge Grosscup says:

"There can be no doubt but that to courts is given by the Constitution the absolute power of regulating commerce between the States. This power, independently of legislation, is not necessarily exclusive of the statutes to reasonably regulate such incidents in interstate commerce lying within their respective jurisdiction, as wharves, harbors, pilots, roads, bridges, &c. A wharf, harbor or bridge lying within the statute is a tangible entity, over which the laws of the State extend. The cost of their creation and the expense of their maintenance make the imposition of

tolls or charges not only reasonable, but necessary. This must be enforced by, and subject to, some law, and, in the absence of Congressional legislation, there is no law except that of the State. The application of State law in such cases is not inconsistent with the general power conferred upon Congress, and does introduce into commerce either confusion or restraint. Such regulations may exist harmoniously with regulations imposed by other states upon wharves, harbors and bridges within their territory or limits, but the fixing of a rate for the carriage of goods from one state is not simply the incident of or appurtenance to commerce, but is the very core and essence of interstate commerce."

It is apprehended that the foregoing correctly states the law in so far as the Interstate Commerce Act is involved. It is submitted that the case at bar is not within the operation of that act, and that the COMMON LAW *must govern in determining the rights of the parties.*

Applying the *common law* to the case made by the declaration and plea involved in the demurrer now under consideration, the right of plaintiff seems to be clear. While some of the Federal Courts have held that there is no "National Common Law" applicable in the Federal Courts, the Supreme Court of the United States, in Western Union Tel. Co. vs. Call Pub. Co., 181 U. S., 101, has said:

"There is no body of common law separate and distinct from the common law existing in the several states, in the sense that there is a body statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. * * * * * Can it be that the great multitude of interstate commercial transactions are free from the burdens created by the common law as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of common law are operated upon all interstate commerce transactions, except so far as they are modified by Congressional enactment. * * * * * Reference may also be had to the elaborate opinion of Judge Shiras, holding the Circuit Court of the Northern District of Iowa, in Murray vs. Chi. & N. N. W. Rwy., 63 Fed., 24, in which

is collated a number of extracts from opinions of this Court, all tending to show the recognition of a general common law existing throughout the United States."

What, then, is the *common law* applicable to and governing the relations of the parties to this action in the circumstances set out in the pleadings?

The Supreme Court of the State of Florida, in Indian River Steamboat Co. vs. East Coast Trans. Co., 28 Fla., 433, says:

"If either company should erect a dock or wharf for its private use, we know of no law to prohibit it. * * * Undoubtedly, if either company should erect a dock or wharf and open it to the public for a general wharfage business, the public would have a right to use the same under such regulations and upon the payment of such charges as the owner might fix, or as might be regulated by law. * * * * But we are not dealing with the sole question of ownership or rights in reference to a dock or wharf * * * * but it also appears that upon this dock is the tracked terminus of a common carrier."

And, at page 435 the court says:

"The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian River by means of steamboats, rent from a railroad common carrier its dock on said river on which its track and terminal facilities are located and exclude others from renting at said terminal point for the purpose of delivering and receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract the common carrier can select one connecting line of boats and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this."

The law of this Florida decision was fully sustained, and the opinion of the Court complimented, in Or Short Line Rwy. Co vs. I. R. M. Co., 51 Fed., 611. The decision there, as stated in the headnote, is this:

"A railroad company owning a wharf extending into

public navigable waters, maintained thereon a station and passenger depot, and used the wharf for its own line of steamers in connection with its railroad traffic, *held:* That a steamboat company not a rival of the railroad company in its railroad business was entitled to use the wharf for a reasonable compensation, to the extent of receiving and discharging passengers and freight."

In the opinion reference is made to the above cited decision of the Supreme Court of Florida, as follows:

"Rather than extend this opinion by even referring to the numerous authorities bearing upon the questions involved, I will merely refer to the very instructive opinion of the Supreme Court of Florida in the recent case of Indian River Steamboat Co. vs. East Coast Trans. Co., 10 So. Rep., 480, and the cases therein cited."

It is true that this case was reversed in I. R. M. Co., vs. Or. Short Line & W. N. Rwy. Co., 57 Fed., 673, but the decision of the case did not militate against the principle now under consideration, as appears from the statement of it in the headnote, to-wit:

"A transportation company operating a railway and a line of steamboats connecting at the company's wharf, is not required by the 3rd section of the Interstate Commerce Act to permit the boats of a competitor to land at such wharf."

And it is to be observed that in the body of the opinion there is the following statement:

"That defendant has, during all the time since it constructed the said wharf, *used it as its own private property, and not as a public wharf, and has refused at all times to allow any other person or persons, firm or corporation to use it or share in the use thereof.*"

In the present case the situation is entirely different. The declaration alleges (Tr. Rec., p. 6): "The defendant's *wharf extending into the Bay of Pensacola,* was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from the said wharf * * * * *which was and is a public wharf.*"

Such allegations are only met, as we have already pointed out, in an argumentative way by a skillfully

worded plea, the statements of which, when analyzed, will be found not to negative the description of the wharf as stated in the declaration.

It is believed that this Court will discover that the wharf in question was operated by the defendant, not as a private wharf, but for use not only by the boats operated by it and the Gulf Transit Company, but also *by all persons with whom the defendant* should see fit to make "special arrangements." That is, it appears that *the wharf was not a private but a public wharf;* it was used, not only in the private business of defendant, but as a facility in the navigable waters of the Bay of Pensacola, in aid of commerce engaged in by the Louisville & Nashville Railroad Company and by the Gulf Transit Company, and *by all the rest of the* PUBLIC, which is described in the plea as "persons with whom the defendant should make special arrangements for traffic in connection with vessels other than those of the Louisville & Nashville Railroad Company and the Gulf Transit Company."

It is perfectly obvious that the course of the defendant was to give to *a very large portion of the* PUBLIC the right to use its wharf, with the result that such wharf became a facility in which *the public as a public had become interested* in such manner and to such extent as to deprive the defendant of the right to claim that it was a private wharf, in the operation of which the public were not entitled to insist that *equal privileges were to be accorded to all persons requiring them in their respective businesses.*

The law as to a wharf in such circumstances is thus stated by the United States Supreme Court in the case of Munn vs. Ill., 94 U. S., 125:

"Looking then to the common law, from whence came the right which the constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than one hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of *public consequence* and affect the community at large. When, therefore, one devotes his

property to *a use in which the public has an interest*, or in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

"Thus as to ferries Lord Hale says, in his treatise *De Portibus Maris*, 'The king has a right of franchise or privilege that no man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge and is become a thing of public interest or use, and every man for his passage pays a toll,'" &c.

This Court has also said in Dutton vs. Strong, 1 Black (U. S) 33:

"Whether a wharf is private or public may depend in case of dispute upon several considerations involving the purpose for which it was built, the use to which it has been applied, the place where located and the nature and character of the situation."

The law is also similarly stated in Gould's Law of Waters, 231, 232, and 1 Dillon's Mun. Corps., §68.

In Compton vs. Hawkins, 8 So. Rep. (Ala.), 75, the Court said:

"Whether a wharf or landing is public or private depends upon the ownership of the soil, the purpose for which it was erected, the uses to which it has been applied and the nature and character of the structure If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if it be at the terminus of a public highway and practically form a part thereof, or has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing."

Barrington vs. Commercial Dock Co., 45 Pac. (Washingington), 748, 33 L. R. A., 116, is quoted by the Circuit Court of Appeals (121 Fed., 649) in support of the decision

there made. We shall, therefore, refrain from incumbering this brief with a repetition thereof.

2

In the brief for petitioner it is said that there is no allegation that the public, or plaintiff as one of the public, has not been fully served in the facilities provided by the defendant for the transportation of exports from the end of its line (its wharf) to the unnamed ports mentioned in the declaration to which the plaintiff desired to ship.

We are at a loss to understand this statement, because it is directly alleged in the declaration as follows: "The defendant notified plaintiff that it would refuse to permit plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, to be at, from or by means of its said wharf loaded upon or delivered to certain vessels, with the managers of which plaintiff had contracted for the taking thereof, from Pensacola to other ports, to which plaintiff intended and had made "arrangements to ship the same, or to permit the said wharf of defendant to be used in the prosecution of plaintiff's business, as aforesaid, in so far as the prosecution thereof should involve the use of said vessels in shipment of plaintiff's said turpentine and rosin from Pensacola, by means whereof plaintiff sustained great loss and damage."

And then follows specifications of damages.

And it should also be remembered that the declaration also alleges "that the course of business dealing between plaintiff and defendant was for plaintiff to transfer over the said switch and defendant's railway, into the City of Pensacola, by means of defendant's car, and locomotives, plaintiffs turpentine and rosin to be upon defendant's wharf," and that "in the midst of the prosecution of its said business, defendant notified plaintiff that it would refuse to permit plaintiff to use defendant's wharf for the purposes stated."

3

In brief for petitioner it is also suggested (Tr. Rec., p. 25), referring to the Express Cases, 117, U. S., 1, that if a carrier affords all reasonable accommodation it owes no duties to the public as to the particular agencies it shall select for that purpose.

But in this case it does not appear that the defendant offers to the plaintiff reasonable accommodations for the transportation of plaintiff's naval stores from the port of Pensacola, but defendant boldly plants itself upon the contention, not that it was prepared to furnish facilities to complainant, and that such was the reason for the course taken, but that, to permit plaintiff to carry on its business as it desired to do would be to bring in competition with the defendant railroad company and lines constituting its agencies and lines with which it intended to contract. In other words, that its intention was if possible to force plaintiff to patronize the agencies and lines mentioned, without asserting that such agencies and lines could accommodate the plaintiff, or would be willing to do so under any circumstances.

4

We fail to discover that plaintiff's contention in this case and the ruling of the Circuit Court of Appeals make a case within the description of either of the special grounds for the petition in *certiorari*. We do not find that the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court, or contrary to the decisions of other Circuit Courts of Appeal. or in conflict with the decisions of the English Courts and the higher State Courts of Appeal; neither can we concur in the contention that the question involved is of national importance or of international importance.

5

The brief of the petitioner insists that plaintiff makes no case of discrimination against it. The gist of the case is not that there has been a discrimination; it is that the wharf in question has been given to the public to the extent stated in the declaration and admitted in the plea, and that *such action impresses upon the wharf a public character*, on account of which the public, of which the plaintiff is one, has the right to make such reasonable use of the wharf as it may desire, so long as in doing so it does not interfere with the use thereof by the defendant or other portions of the public.

In this connection we may refer to the suggestion made in the brief of the petitioner, illustrated by the case of the

Pennsylvania R. R. Co., which has docks in Jersey City for the reception and discharge of passengers on its line. It is said in the brief (p. 20): "If, however, it only had a contract with the independent line of ferry boats to perform this service, and an outside boat insisted that it too had a right to bring passengers and claim a berth at the dock for their discharge, and insisted that the regular boats employed by the company should wait until the berth was vacated by it, would, in the event supposed, a passenger who came from Philadelphia to Jersey City over the railroad company's lines, have a right to insist that the ferry boat selected by him should be allowed to come into the railroad company's slips in order to ferry him across, even though it delayed and excluded the regular ferry boat?"

We submit that the suggestion and illustration are extreme and are entirely aside from the conditions of the instant case. If it appeared in this case that only boats belonging to the defendant, or boats hired by defendant, were permitted to use the wharf in question, there might be some basis for the contention that the wharf was a private one. If it was alleged that the use that the plaintiff intended to make of the wharf by bringing there the boats with which it had contracted would embarrass the business of the defendant, as would be the situation with the Pennsylvania ferry if other ferry boats sought to obtain use of its limited wharf space, there might perhaps be some reason in the contention, but the suggestion made and the illustration offered are so foreign to the case made by the pleadings here before the Court, that it is believed that further comment upon them is unnecessary.

We will add, by referring to the *Express Cases*, upon which so much stress is laid by petitioner's counsel, that the language of this Court in those cases is such as to indicate that they have no application to the instant case and cannot assist the Court in deciding it.

We quote from it as follows:

"The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be in a measure under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at

times fill all the space one railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

The pleadings in this case do not show such a situation as was before this court in the *Express Cases.*

Respectfully submitted,

JOHN C. AVERY,
Attorney for Respondent.